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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

FOUNDATION FOR THE JUNIOR BLIND  
OF AMERICA et al.,

Plaintiffs and Respondents,

v.

ROBERT VANN DOWNS, Individually and  
as Trustee, etc., et al.,

Defendants and Appellants.

B201832

(Super. Ct. No. BP 093250)

APPEAL from a judgment of the Superior Court of Los Angeles County.

Aviva K. Bobb, Judge. Affirmed.

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Oldman, Cooley, Sallus, Gold, Birnberg & Coleman, Marshal A. Oldman and  
Mary-Felicia Apanius for Defendants and Appellants.

Weinstock, Manion, Reisman, Shore & Neumann, M. Neil Solarz, and Blake A.  
Rummel; Jess Whitehill, Jr., for Plaintiffs and Respondents.

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This is an appeal from a judgment declaring “that the ‘Herbert Posnack 2000 Trust’ is null and void.” We affirm.

### **FACTS AND PROCEEDINGS BELOW**

When Herbert Posnack created and executed the Herbert Posnack Family Trust in November 1996 (hereafter the 1996 Trust) he provided that upon his death and the death of his spouse the bulk of his estate, estimated at between \$2,000,000 and \$3,000,000 would be distributed in equal shares to ten charities (the Charities) including the plaintiffs in this action. The trust provided small monetary gifts to Posnack’s relatives and friends. It did not mention Robert or Joan Downs. Posnack’s spouse died in 1998. Posnack died in February 2005. The couple had no children.

In 1999, Posnack purportedly revoked the 1996 Trust and, the following year, purportedly created and executed the Herbert Posnack 2000 Trust, (hereafter the 2000 Trust) appointing himself as trustee. In December 2000, Posnack appointed Robert Downs as his successor trustee.

The 2000 Trust differs significantly from the 1996 Trust in its distribution of assets upon Posnack’s death. The trust provides for monetary gifts to Posnack’s relatives and for gifts between \$5,000 and \$10,000 to the Charities. The bulk of the trust assets, however, go to Robert Downs, “a good friend,” who receives over \$1,000,000 and to Downs’ wife, Joan, also “a good friend,” who receives \$500,000. At various times after purportedly creating the 2000 Trust Posnack allegedly executed amendments to the trust increasing the gifts to the Downs and making gifts to their children.

In July 2005 the Charities filed a verified petition to determine the validity of the 2000 Trust and for other relief. The petition named Robert Downs as a defendant individually and as trustee of the 2000 Trust and named Joan Downs as an individual defendant. The petition alleged the trust is void because Posnack executed it as the result of undue influence and fraud on the part of the Downs, mistakes of fact on the part of Posnack and because it was not duly executed by Posnack. The Downs responded to the petition denying its allegations. They also filed a demurrer contending, among other

things, that the Charities lacked standing to bring the petition because Posnack had revoked the 1996 Trust and the Charities were not residual beneficiaries under the 2000 Trust. The trial court overruled the demurrer as to standing, sustained it as to other contentions and granted the Charities leave to amend. The Charities filed an amended petition in April 2006.

While trial on the petition challenging the 2000 Trust was pending, the Charities petitioned the court to remove Robert Downs as trustee. The court granted the removal petition in December 2005 and appointed William O. Gamble “to act as interim trustee of the Herbert Posnack 2000 Trust.”

Trial commenced in October 2006. The Charities called Robert Downs as a hostile witness under Evidence Code section 776 and examined him for several days. On the last day of his examination by the Charities, Downs fell while leaving the witness stand and never resumed his testimony. He died a few weeks later, allegedly as the result of injuries he suffered in the fall. Joan Downs claimed that her husband tripped over computer cables that the attorneys for the Charities had stretched across the floor of the courtroom between the witness stand and the counsel table.

The trial was suspended after Downs’ accident and it did not resume until two months after his death. In the meantime, Joan Downs and the Downs’ children filed a wrongful death action against the Charities and their attorneys alleging that they were negligent in stringing their power cables across the pathway to and from the witness stand. While that action was pending Joan, individually and as administrator of Robert’s estate, moved for a mistrial on the ground that the misconduct of the Charities’ attorneys irreparably prejudiced the Downs’ defense because their attorneys never had the opportunity to examine Downs as a “friendly” witness. Joan also filed a statement of disqualification of the trial judge asserting that the potential involvement of her court staff as witnesses in the wrongful death action might compromise her impartiality or at

least give the appearance of a lack of impartiality. The judge struck the statement of disqualification and denied the motion for a mistrial.<sup>1</sup>

The trial resumed in March 2007 and concluded the following month. The court ruled in favor of the Charities, finding that “the 2000 Trust was not duly executed by [Posnack] and is therefore null and void.” The court subsequently entered a judgment for the Charities. A timely appeal was filed by Joan Downs and by Eric Downs as administrator of the estate of Robert Downs.<sup>2</sup> We will refer to appellants collectively as the Downs.

### **I. THE CHARITIES’ STANDING TO CHALLENGE THE VALIDITY OF THE TRUST**

The Downs argue that the Charities lack standing to challenge the validity of the 2000 Trust because they are not “interested persons” under Probate Code section 48.<sup>3</sup> This argument lacks merit.

The Charities’ standing derives from section 17200, subdivision (a), which states in relevant part: “[A] beneficiary of a trust may petition the court under this chapter . . . to determine the existence of the trust.” The Charities are named as beneficiaries in the 2000 Trust and their petition seeks to determine the validity of that trust. Section 48, cited by the Downs, defines the term “interested persons” as that term is used in other sections of the Probate Code. It does not apply to section 17200, subdivision (a).

It is true, as the Downs point out, that if the Charities succeed on their petition the 2000 Trust is void and the Charities will take nothing under its terms. The Charities are apparently willing to take that risk, possibly in the belief that in a later proceeding they can void the revocation of the 1996 Trust.

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<sup>1</sup> We are informed by appellants that the wrongful death action has been settled.

<sup>2</sup> The Downs have withdrawn their appeal from the court’s striking their statement of disqualification.

<sup>3</sup> All statutory references are to the Probate Code unless otherwise stated.

## II. COLLATERAL ESTOPPEL EFFECT OF THE APPOINTMENT OF AN INTERIM TRUSTEE

The Charities filed their petition to determine the validity of the 2000 Trust in July 2005. While that petition was pending, the Charities filed a petition in the same action seeking appointment of an interim trustee of the 2000 Trust to replace Robert Downs. The petition alleged that Downs had filed for bankruptcy which automatically created a vacancy in the trusteeship of the 2000 Trust. (§ 15643, subd. (f).) The petition further alleged that there were assets of the 2000 Trust that needed to be safeguarded pending a determination of the validity of that trust. The trial court granted the petition to appoint an interim trustee and appointed William Gamble to that office.

The Downs contend that the court's appointment of an interim trustee of the 2000 Trust constituted a decision on the merits that the 2000 Trust is valid and that the doctrine of res judicata prohibited the court from subsequently determining that the trust is invalid. We disagree.

Res judicata describes the preclusive effect of a final judgment on the merits. The appointment of an interim trustee was not a final judgment. The term for issue preclusion, which is what the Downs are asserting here, is collateral estoppel. (*Mycogen Corp. v. Monsanto Co.* (2002) 28 Cal.4th 888, 896.) The doctrine of collateral estoppel "precludes relitigation of issues argued and decided in prior proceedings." (*Lucido v. Superior Court* (1990) 51 Cal.3d 335, 341.) So far as the record shows, the issue of the validity of the 2000 Trust was neither argued nor decided in the proceedings on the Charities' petition to appoint an interim trustee. Nor was the issue of the trust's validity necessarily determined by the order appointing an interim trustee. The purpose of the Charities' petition was to oust Robert Downs from control over the assets of the trust pending a determination of its validity. The Downs offer no explanation why the court should first have to determine the validity of the trust before appointing someone to take charge of its assets on an interim basis. The case on which the Downs rely, *Silverston v. Mercantile Trust Co.* (1912) 18 Cal.App. 180, is not on point. In *Silverston* the court held that res judicata barred the plaintiff's challenge to the validity of the trust because

(1) she stipulated that its validity had been “duly adjudged and decided” in three previous actions (*id.* at p. 183), (2) it was the plaintiff’s burden to show that the validity of the trust had not been previously adjudicated but she failed to do so (*id.* at p. 185), and (3) the validity of the trust was necessary to the judgments in the previous actions (*id.* at pp. 188, 190).

### **III. VALIDITY OF THE TRUST**

The court found that a number of discrepancies existed in the document purporting to be the 2000 Trust. The document the Downs produced at trial had five more pages than another document which also purported to represent the 2000 Trust. Some of the pages in the proffered document were handwritten by someone other than Posnack. Some of the typewritten pages had more than one type font. A number of the pages were written in their totality by Robert Downs. Although Posnack’s signature and fingerprint appear on many of the pages of the document, the court found based on the expert testimony that some were affixed to originally blank pages. Some of the pages are printed in both toner and inkjet “showing that they were cut-and-paste jobs.” In addition, the court found that Robert Downs testified inconsistently as to when he learned he would be a beneficiary under the trust and that Robert and Joan Downs were “outright lying” about how the document purporting to be the 2000 Trust came to be. For these reasons the court concluded it could not find “that there is sufficient evidence that this document is what it purports to be.”

The Downs do not challenge any of the court’s factual findings as lacking sufficient evidentiary support. Rather, they argue that the court erred in “focusing solely on whether the 2000 Trust was authentic or not” and ignoring “the fact that the essential elements of a trust were present, and that a trust had in fact been created.” This argument misses the mark. The issue before the court was not whether the purported trust document lacked the essential elements of a trust. The issue, as the court expressed it, was whether “the document that [the Downs] say is the trust and its amendments[] is . . . an authentic document by Mr. Posnack.” The court declared the trust invalid because it

could not determine whether the provisions in the document proffered by the Downs represented the trust Herbert Posnack intended to create. Analogizing to the rules of evidence on the authentication of documents, the court found that Robert and Joan Downs failed to provide an explanation for, and indeed “outright lied” about, the alterations in the document. (Evid. Code, § 1402.) Consequently, the Downs failed to provide “evidence sufficient to sustain a finding that it is the writing” that the Downs claim it is. (Evid. Code, § 1400.)

We find no error in the court’s reasoning.

#### **IV. ROBERT DOWNS’ DEATH AS GROUND FOR A MISTRIAL**

After Robert Downs’ death, the Downs moved for a mistrial on the theory his death resulted from the misconduct of counsel for the Charities in negligently creating a dangerous condition in the courtroom which deprived the defense of its most important witness. The court denied the motion.

The decision whether to grant a mistrial is committed to the sound discretion of the trial court. (*People v. Wallace* (2008) 44 Cal.4th 1032, 1068.) We find no abuse of discretion here.

The Downs offered no evidence to support their contention that Robert Downs’ accident was the result of negligence on the part of the Charities’ attorneys or that this alleged negligence was a proximate cause of Downs’ death. In any case, a mistrial would not have cured the alleged prejudice to the defense from the loss of Downs’ “friendly” testimony because that testimony was permanently lost. The solution to the problem caused by Downs’ unexpected death—offered by the trial court and rejected by the Downs—was to admit into evidence Downs’ testimony at his deposition where his counsel had at least had an opportunity to examine him. (Code Civ. Proc., § 2025.620, subd. (c)(2)(C).) This proposed solution was not unreasonable. We do not agree that it was necessary to declare a mistrial in order to create a “level playing field” where all of Downs’ testimony would be read into the record.

**DISPOSITION**

The judgment is affirmed. Respondents are awarded their costs on appeal.

NOT TO BE PUBLISHED.

ROTHSCHILD, J.

We concur:

MALLANO, P. J.

WEISBERG, J.\*

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\* Retired Judge of the Los Angeles Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.